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Defendant, Affliction Entertainment Group, LLC, erroneously sued herein as
Affliction Entertainment, LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

FEDOR EMELIANENKO, an individual; M-1 NEDERLAND b.v., a Dutch limited liability company,

Plaintiffs,

v.

AFFLICTION INC. dba AFFLICTION CLOTHING, a California business entity, form unknown; AFFLICTION ENTERTAINMENT, LLC, a California limited liability company; and DOES 1 through 50, inclusive,

Defendants.

Case No.: CV09-07865 MMM
(MLGx)

**DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF OPPOSITION
TO M-1 NEDERLAND B.V.'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

DATE: June 6, 2011
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CTRM: 780

Honorable Margaret M. Morrow

TRIAL DATE: August 16, 2011

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I. INTRODUCTION

Plaintiffs have spent countless hours taking numerous depositions and propounding repeated written discovery. The product of much of that effort is contained in the 600+ alleged uncontroverted facts and 400+ exhibits. However, contained, but not explained, in this massive motion is the simplicity of its opposition. While the major task to dispute and/or address the claimed facts is complete, what is left is a succinct set of undisputed facts that creates the triable issue at the heart of the “consulting agreement” that existed before this litigation.

The writings and actions of M-1, Affliction, and third parties, as well as the “fight agreement” language itself, establish the “consulting agreement” as a “sham” and as never having possessed any consideration to be binding on anyone.

As succinct and straightforward as is this opposition, so too is Defendants’ Motion for Partial Summary Judgment as to the first and second causes of action relating to the “fight agreement.” Defendants thought in the meet and confer discussions that Plaintiff’s motion would address this agreement. Since, Fedor Emelianenko (“Fedor”) is not a moving party and has not sought partial summary judgment as to the Fight Agreement, Defendants’ affirmative motion is quite different than their opposition to M-1’s motion for partial summary judgment.

The “fight agreement” language is straightforward. The agreement terminated on March 31, 2009 if there was no third fight by that date. There was no third fight by that date. It is further uncontroverted, through admissions of Plaintiff, there was no written or oral extension given to extend this agreement prior to March 31, 2009. Even after March 31, 2009, M-1 admitted the Fight Agreement had expired through the unambiguous language of its own e-mails (discussed in full, *infra*). A fight was set up for August 1, 2009 between Fedor and Josh Barnett at the Honda Center in Anaheim, California. That fact is uncontroverted. The parties also undisputedly continued to negotiate for a new deal. However, there will be no evidence contemporaneous with that April

1 through July, 2009 time period (other than potentially inadmissible declarations of
2 M-1 representatives trying to explain away the clear meaning of their e-mails) that
3 the fight was anything other than an oral agreement to do the event on this date
4 between these opponents, paying Fedor \$1,500,000.

5 Unfortunately for all involved, through no fault of either Fedor or
6 Affliction, that fight could not happen—Josh Barnett tested positive for steroids
7 and was banned from participation. That fact is also uncontroverted. It was thus
8 impossible for either party to perform that fight on that date with those fighters.
9 Affliction's obligations were legally extinguished at that time.

10 M-1 throws up a smoke screen of issues about replacement fighters and
11 postponements that are of no moment. The uncontroverted facts are there was no
12 agreement to provide a replacement fighter although Affliction reasonably looked
13 into the possibility to see if it could salvage this tragic circumstance. There was
14 also no agreement to postpone the fight and absent such, no obligation to do so.

15 Under the axiom of "no good deed goes unpunished", Affliction
16 accommodated M-1/Fedor's request to pay Fedor under two agreements, and for
17 the first time since the agreements were executed, M-1 in this litigation is raising
18 and using this accommodation for something it never was, spending hundreds of
19 thousands of dollars in the process. Out of Plaintiff's over 1400 pages of exhibits
20 and 13 declarations, the agreement between the parties is succinctly stated in 13
21 lines in M-1's representative's, Vadim Finkelchtein, deposition. He states the
22 offer to co-promote by M-1, Affliction's rejection and the acceptance by M-1 of
23 Affliction's offer to pay Fedor \$1,500,000, with M-1 making up the \$500,000
24 difference in their rights to promote these fights in Russia and Asia (*i.e.*, the fight
25 agreement). Declaration of Mark W. Huston ("Huston Decl."), Ex. D, p. 56.
26 Plaintiff's motion for partial summary judgment should be denied and Defendants'
27 motion for partial summary judgment as to the first and second causes of action
28 should be granted.

1 For ease of understanding, as explained in the declaration of Michael
2 Bassiri, the company executing the two agreements (Affliction Promotions, Inc.)
3 and its eventual successor company that staged and promoted the fights that
4 occurred (Affliction Entertainment Group, LLC), as well as Affliction Inc. dba
5 Affliction Clothing, will be collectively referred to as Affliction herein.

6 **II. STANDARD FOR OPPOSING M-1'S SUMMARY JUDGMENT**

7 A party seeking summary judgment has the burden to identify those parts of
8 the record that indicate the absence of a genuine issue of material fact. Once the
9 moving party makes this showing, the nonmoving party must designate specific
10 facts showing there is triable fact. *Brinson v. Linda Rose Joint Venture*, 53 F.3d
11 1044, 1047 (9th Cir. 1995); *Kaplan v. Rose*, 49 F.3d 1363, 1369 (9th Cir. 1994).

12 The moving party's evidence is judged by the same standard of proof
13 applicable at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-53 (1986).
14 "The nonmovant need not match the movant witness for witness, nor persuade the
15 Court that her case is convincing, she need only come forward with appropriate
16 evidence demonstrating that there is a pending dispute of material fact." *Aldridge*
17 *v. American Hoechst Corp.*, 24 F.2d 918, 921 (7th Cir. 1994). Summary judgment
18 is inappropriate if there is genuine issue as to any material fact. FRCP, Rule 56(c).

19 Summary judgment is a drastic remedy and should be granted with caution:
20 "neither do we suggest that the trial courts should act other than with caution in
21 granting summary judgment..." *Anderson v. Liberty Lobby, Inc.*, *supra*, at 255.

22 The test of the opposition's evidence is such that the evidence would cause
23 reasonable persons to disagree on whether the facts claimed by the movant are true
24 "enough to require a judge or jury to resolve the parties' differing versions of the
25 truth." *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983).

26 The evidence opposing a summary judgment motion is to be believed and
27 all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby,*
28 *Inc.*, *supra*, 477 U.S. at 255. That is, at the summary judgment stage, the

1 nonmovant's version of any dispute is presumed correct. See *Eastman Kodak Co.*
2 *v. Image Technical Services, Inc.*, 504 U.S. 452, 456 (1992); *T.W. Elec. Serv. V.*
3 *Pacific Elec. Contractors Assn.*, 809 F.2d 626, 630-631 (9th Cir. 1987).

4 Perhaps most important to the circumstances of M-1's motion for partial
5 summary judgment, **where the basic facts are not in dispute, if reasonable**
6 **minds could differ on the inferences to be drawn from those facts, summary**
7 **judgment should be denied.** *Adickes v. S.W. Kress & Co.*, 398 U.S. 144 (1970).

8 III. PLAINTIFF'S EVIDENTIARY HURDLES

9 As set forth in greater detail in Affliction's Statement of Genuine Issues, the
10 vast majority of M-1's alleged uncontroverted facts are insufficient. As a result,
11 Affliction's objections to such facts must be sustained. The most glaring problems
12 with M-1's alleged undisputed facts fall into the following categories.

13 A. Fact Not Supported by Evidence

14 The cited evidence does not support many of M-1's alleged uncontroverted
15 fact. Short of citing each one out of the 600 facts where this deficiency occurred,
16 the following are a few examples of what M-1 did. There are several statements
17 that describe some act M-1 or BEST performed that was done "under the
18 consulting agreement." Yet the evidence cited does not reference the consulting
19 agreement anywhere. All M-1 has stated is a legal conclusion. Such conclusions
20 are left to the memorandum and ultimately are to be made by the trier of fact; not a
21 statement of fact. After reading M-1's 400+ exhibits, it will not be lost upon this
22 Court that nowhere is the "consulting agreement" discussed post-execution.

23 Similarly, M-1 repeatedly states that it did some act in relation to the "third
24 fight" and then again cites to an e-mail as support of that statement. However,
25 nowhere in the cited e-mail is the "third fight" referenced. It is important to note
26 Affliction is not disputing the e-mails between the parties were sent and/or
27 received. It is Plaintiff's characterization that is objectionable. As the Court will
28 see, these examples were the rule, not the exception, in M-1's motion.

1 B. Consulting vs. Promotion

2 Somewhat overlapping the above problem, M-1 presents a plethora of facts
3 about acts it performed throughout the World. Based upon the undisputed
4 evidence presented by Affliction and the unambiguous terms of the fight
5 agreement, each and every one of those purported uncontroverted facts is
6 irrelevant. The reason being, as further demonstrated below, under the “fight
7 agreement,” not the “consulting agreement,” M-1 had the exclusive rights to
8 “promote” throughout Russia and Asia. Furthermore, the “fight agreement”
9 provided that any and all revenues derived from Fedor and/or M-1’s promotions in
10 Russia and Asia would be retained by Fedor and/or M-1. Relatedly, according to
11 the “fight agreement,” Affliction was to have no responsibility for payment of any
12 expenses in relation to Fedor and/or M-1’s promotional exploits throughout Russia
13 and Asia. This motion is brought on behalf of the “consulting agreement” by M-1,
14 not Fedor under the “fight agreement.” In addition, under the “fight agreement”
15 international “promotion” rights outside of Russia and Asia are held by Affliction,
16 not M-1 or Fedor. The entirety of those facts do not relate to this “consulting
17 agreement” even if it was a valid agreement, which it is not. Thus, statements of
18 fact listing all of these international activities serves no purpose for M-1’s theory
19 that Affliction breached the sham consulting agreement or the letter agreement.

20 C. Beliefs and Understandings

21 M-1 blatantly presents countless alleged statements of fact of M-1’s
22 representatives’ understandings and beliefs regarding or as a result of the contents
23 of an e-mail. Why someone did something is not only irrelevant, but hearsay. The
24 state-of-mind exception to the hearsay rule does not permit the witness to relate
25 any of the declarant’s statements as to why he held the particular state of mind.
26 *U.S. v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir. 1994); FRE 802, 803(3).

27 Affliction understands why M-1 attempts to set forth beliefs, because the
28 language in the documents it attached between the parties do not support

1 Plaintiffs' theories. As discussed, *infra*, this Court will readily understand the
2 meaning of the undisputed documents and cited deposition testimony.

3 **IV. A TRIABLE ISSUE EXISTS AS TO THE VALIDITY OF THE**
4 **"CONSULTING" AGREEMENT**

5 Whether it is the lack of any consideration supporting the "consulting
6 agreement" or the undisputed fact that the "consulting agreement" was an
7 afterthought, at the sole request of Fedor and M-1, to ensure Fedor received his
8 well-publicized per-fight purse of \$1.5 million without sustaining severe tax
9 implications, there is no question that the "consulting agreement" is a sham.

10 A. Lack of Consideration for the "Consulting" Agreement

11 Every contract must be supported by sufficient consideration. *Cal. Civ.*
12 *Code* § 1550. Consideration is an act or return promise, bargained for and given
13 in exchange for a promise, which either gives a benefit to the promisor or imposes
14 a burden on the promisee. (*Cal. Civ. Code* § 1605.)

15 A promise alone, unsupported by consideration, is not enforceable and has
16 no binding force. *Western Lith. Co. v. Vanomar Producers*, 185 Cal. 366, 369
17 (1921). Equally unenforceable is so-called consideration based upon doing or
18 promising to do that which one is already legally bound to do. *Grant v.*
19 *Aerodraulics Co.*, 91 Cal.App.2d 68, 75 (1949).

20 Finally, a party may show the true consideration or want of it by extrinsic
21 evidence for the purpose of avoiding a contract, even though the contract states
22 facts that show a valuable consideration. *Royer v. Kelly*, 174 Cal. 70, 72 (1916).

23 This latter theory (promise to perform existing duty) is precisely why the
24 "consulting agreement" lacks any consideration and therefore is unenforceable.

25 1. ***The Fight Agreement Afforded Affliction and Fedor/M-1 to***
26 ***Promote the Fights in the United States and Abroad***

27 First, under the "fight agreement", not "consulting agreement", Affliction
28 was to be the sole and exclusive **co-promoter**, along with Fedor and his designees

1 (e.g., M-1) of all mixed martial arts contests in which Fedor participated in the
2 United States. Plaintiff's COE Ex. 3, ¶ 6 COE # 000039.

3 Second, although Affliction was to retain exclusive worldwide promotional
4 rights, *id.*, those rights were subject to the following: Fighter and his designees
5 had the exclusive right to promote bouts in the territories of **Russia and Asia**
6 (defined as China, Hong Kong, India, Indonesia, Japan, Malaysia, Philippines,
7 Singapore, South Korea, Taiwan, Thailand). *Id.* at ¶ 11 #000041-42. Additionally,
8 excluded from Affliction's exclusive rights (in addition to promotions in Russia
9 and Asia) Fedor and his designees had the right to participate in a Fedor v. Randy
10 Couture fight anywhere in the World and had the exclusive rights to promote that
11 fight anywhere in the World. *Id.* at ¶ 6 COE # 000039-40.

12 Third, under the fight agreement, which granted Fedor and his designees
13 (M-1) the exclusive promotional rights in Russia and Asia, Fedor and his assignee
14 (M-1) had to right to exclusively retain any and all revenues derived from their
15 sale, license or other exploitation of those promotional rights in Russia and were
16 also solely responsible for any all costs for the exercise of those rights. *Id.* at ¶ 11
17 COE # 000041-42. As a result, Affliction had no responsibility for the payment
18 of the exploitation of those promotional rights in Russia and Asia. *Id.*

19 Based upon the express terms of the fight agreement, all of M-1's
20 promotional activities outside of the United States were provided for by way of the
21 fight agreement, not the consulting agreement.

22 **2. *Terms (and Lack Thereof) of the Purported Consulting Agreement***

23 For the sake of argument only, the terms of the document entitled
24 "consulting agreement" state that M-1 shall provide "general consulting services"
25 to Affliction in connection with the fight agreement in the following areas: (1)
26 International (excluding U.S.); (2) International (excluding U.S.) Bout Consulting;
27 (3) International (excluding U.S.) television; (4) fighter scouting; (5) location
28 scouting for future bout recommendations; (6) television-related opportunities; (7)

1 International (excluding U.S.) sponsorships; and (8) bout tourism. Plaintiff's COE
2 Ex. 2, COE # 000033.

3 Also, M-1 was to cooperate and assist in the advertising, publicity and
4 promotion of each bout. In fact, the very language of the consulting agreement
5 states "[i]n addition to the Consulting Services, **and as set forth in the Fight**
6 **Agreement**, M-1 shall fully cooperate with and assist in the advertising, publicity
7 and promotion of each bout reasonably requested by [Affliction]" *Id.* at COE
8 # 000034, ¶ 2.b. All this is a verbatim rehash of paragraph 12 of the fight
9 agreement wherein fighter must participate in "advertising, publicity and
10 promotion of each Bout" *Id.* at COE, Ex. 3 COE # 000042. If M-1 wants to
11 accompany Fedor, that is their business. Affliction is not paying M-1 \$1,200,000
12 to do what the fight agreement says Fedor must do for no additional compensation.

13 Furthermore, the document entitled "consulting agreement" makes no
14 mention of M-1 being permitted to carry out its "promotions" by entering into
15 contracts with third parties for the benefit of itself. In fact, that interpretation
16 violates California's Civil Code § 1638, which states: "The language of a contract
17 is to govern its interpretation, if the language is clear and explicit, and does not
18 involve an absurdity." Cal. Civ. Code § 1638. Affliction is going to pay M-1
19 \$1,200,000 for M-1 to promote itself and enter into contracts with third parties to
20 which they got the profit and not Affliction?!? Such an interpretation is contrary
21 to common sense let alone any rational business enterprise. M-1's position is
22 wholly consistent with the terms of the fight agreement, which gave Fedor and his
23 designee (M-1) the exclusive rights to promote in Russia and Asia. M-1's duty to
24 promote said bouts under the "consulting agreement" was already a pre-existing
25 duty under the fight agreement and the consulting agreement was not supported by
26 any "new" consideration.

27 As for the "consulting" services, they too do not make sense. The
28 "Consulting Agreement" calls for "International (ex US) Bout-Consulting"

1 services; however, for “bouts”, under ¶ 6, the “Fight Agreement” states, “contests
2 in which Fighter fights in the United States (the “Bouts and each, a “Bout”)”
3 Plaintiff’s COE, Ex. 3, # 000039 ¶ 6. Why would Affliction pay M-1 for
4 international bouts when the fight agreement calls for “the Bouts” in the U.S.?

5 As explained below, there is no rational explanation why M-1 would get
6 paid \$1,200,000 for its “services” under ¶ 2 of this “consulting” agreement.

7 At the very least, Affliction has created a triable issue as to the actual, legal
8 and sufficient consideration for the “consulting agreement” to be enforceable.

9 **3. *M-1’s Alleged Performance is Consistent with the Fight Agreement***
10 ***and Wholly Inconsistent with the Consulting Agreement***

11 M-1 goes to great lengths to demonstrate its “performance” pursuant to the
12 terms of the alleged “consulting agreement.” However, the very acts performed
13 by M-1 and/or its associates were not mandated by the document entitled
14 “consulting agreement,” but rather by the fight agreement.

15 By examining a few of the examples of M-1’s performance summarized in
16 its points and authorities, it is obvious they were based upon the terms of the fight
17 agreement, which granted exclusive rights to Fedor and his designees to promote
18 the fights in Russia and Asia. First, M-1 allegedly promoted Trilogy by placing
19 billboards throughout Moscow, St. Petersburg, Japan and Korea. M-1’s Fact 187.
20 These four places are within the exclusive promotion rights (Russia and Asia)
21 granted under the Fight Agreement. Second, Raimond worked with M-1’s
22 Japanese promotion contacts to create a publicity blitzkrieg in Japan. In Fact 195,
23 Plaintiff states through Real Entertainment M-1 promoted Trilogy in Japan.
24 Finkelchtein worked with his Russian contacts in an attempt to televise Trilogy on
25 Russia’s state-run television channel. Mr. Spencer, on behalf of M-1, solicited
26 opportunities in Thailand (fact 171) and Korea (fact 168), television stations in
27 Russia (π’s fact 165), contacted Philippine companies (fact 160), contacted
28 Dentsu, Gaora, Hakuhodo, Jsports, TV Tokyo in Japan (fact 151). This list goes

1 on, but all of this undisputedly is Fedor's right to do under the Fight Agreement.
2 Affliction had no right to enter these territories. How then could anyone interpret
3 these acts to be assisting Affliction under the "consulting agreement"?!

4 All in all, the fight agreement gave Fedor and his designee, namely M-1, the
5 right to partake in the alleged promotion activities they claim to have undertaken
6 in pursuit of the consulting agreement to which they claim resulted in M-1
7 suffering damages for which they bring this lawsuit for compensation. It makes
8 no sense. The terms of the fight agreement are very clear that Affliction shall have
9 no responsibility for payment of any expenses as a result of the rights reserved
10 specifically for Fedor or his designee (*i.e.*, promotional rights in Russia and Asia).

11 **4. M-1 Cannot Demonstrate that it Provided any Consulting**
12 **"Services" for Affliction's Benefit**

13 Notwithstanding the above, assuming (for argument's sake only) the
14 "consulting agreement" is valid and enforceable; it sets forth "consulting services"
15 to be provided by M-1 to Affliction. In other words, whatever M-1 was to be
16 "consulting" on pursuant to this agreement was to be done for and to the benefit of
17 Affliction. Otherwise, what would be the consideration for paying M-1 \$1.2
18 million in accordance with the compensation terms of the "consulting agreement?"
19 Affliction submits that not only are all the alleged activities performed by M-1 not
20 "consulting" services (instead activities done to promote the fights), but also
21 Affliction received no benefit from such activities.

22 Plaintiff's Exhibit 258 (COE # 001113) is a contract between M-1 and OJC
23 in which M-1, not Affliction, receives \$19,250.00. Plaintiff's Exhibit 259 (COE #
24 001125-26 [payment terms]) M-1 (licensor), not Affliction, is to receive the fees.
25 Plaintiff's Exhibit 262 (COE # 001169-86) is a contract between Main Event
26 Television in Australia and M-1/BEST for the Affliction Trilogy fight. Paragraph
27 6 of that contract states Licensee/Main Event Television shall pay Supplier (M-
28 1/BEST), not Affliction. The examples are all the same. M-1 has presented no

1 contract that Affliction is to receive the fees. So how is any such contract, which
2 M-1 alleges is indicative of its performance under the consulting agreement, a
3 service for the benefit of Affliction?

4 Furthermore, since the only “promotion” rights are pursuant to the fight
5 agreement, all of M-1’s performance related to promotion outside of Russia and
6 Asia, was a breach of the fight agreement language by entering into territory that
7 was exclusively under the promotional domain of Affliction, to which only M-1
8 benefited. While not the subject of this motion, M-1 has admitted breaching the
9 Fight Agreement. Once again, at a minimum, there are triable issues of fact as to
10 the lack of consideration under the purported agreement.

11 B. The “Consulting Agreement” Was a Sham Transaction

12 1. ***Legal Authority Governing Sham Agreements***

13 Whether a contract is a sham intended to deceive a third party or whether it
14 is a transaction entered into to create deductible losses or expenses and avoid tax
15 liability, such contracts are invalid and unenforceable. *See, Fashion Valley Mall,*
16 *LLC v. County of San Diego*, 176 Cal.App.4th 871, 880-881 (2009); *FPI*
17 *Development, Inc. v. Nakashima*, 231 Cal.App.3d 367, 401, fn. 18 (1991).

18 Furthermore, California law permits the introduction of parol evidence to
19 prove that a written agreement was actually a cover-up for fraudulent or illegal
20 activity and to establish that such contact had no force, efficacy, or effect. Cal.
21 Code Civ. Proc. § 1856; *Lewis & Queen v. N.M. Ball Sons*, 48 Cal.2d 141, 148
22 (1957); *P.A. Smith Co. v. Muller*, 210 Cal. 219, 222 (1927); *see also, Jinro*
23 *America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 999-1000 (2001)
24 (“*Jinro*”). The parol evidence rule is not a rule of evidence, but is one of
25 substantive law, thus California substantive law applies in this instance. *Estate of*
26 *Gaines*, 15 Cal.2d 255, 264 (1940).

27 Additionally, the Restatement (Second) of Contracts, which California
28 recognizes and adheres by, provides: “Agreements and negotiations prior to or

1 contemporaneous with the adoption of a writing are admissible in evidence to
2 establish . . . illegality, fraud, duress, mistake, lack of consideration, or other
3 invalidating cause. Rest. 2d of Contracts, § 214(d). Furthermore, comment “c” to
4 section 214 explains the meaning of “other invalidating cause” in the following
5 way: “What appears to be a complete and binding integrated agreement may be a
6 forgery, a joke, a sham, or it may be illegal. Such invalidating causes need not and
7 commonly do not appear on the face of the writing. They are not affected even by
8 a ‘merger’ clause, and parol evidence is always to be admitted.” *Id.*

9 **2. Facts and Circumstances that “Consulting Agreement” is a Sham**

10 Ignoring Plaintiff’s after-litigation attempts to explain away the actions of
11 the parties, such actions are numerous in amount and unambiguous in content.
12 There never was a contract for “consulting”; only a mechanism to save Fedor
13 taxes. Examples are as follows:

- 14 • The initial contacts were that \$1,500,000 was all that Affliction could pay
15 Fedor. Defendants’ Statement of Genuine Issues in Opposition, Additional
16 Disputed Facts, Fact No. 1.
- 17 • The first 2 drafts, one by M-1, list the \$1,500,000 purse fee to Fedor. *Id.* at
18 Fact Nos. 2, 5-6.
- 19 • M-1 had a contract to pay Fedor \$2,000,000 which M-1 testified was his
20 reasonable purse per fight value, not \$300,000. *Id.* at Fact Nos. 3, 20.
- 21 • M-1 testified while they requested a co-promotion deal, Affliction refused
22 and “that’s why we decided on the offer that Affliction is going to pay for
23 Fedor’s participation, one and a half million, and the rest we are going to
24 pay. And we are going to get the rights on our territories and we are going
25 to have money coming from that.” *Id.* at Fact No. 4
- 26 • M-1, not Affliction, raised the issue of 2 agreements in discussing tax
27 obligations of Fedor. *Id.* at Fact No. 7.

- 1 • M-1, not Affliction, chose the subjects of “consulting” and
2 \$300,000/\$1,200,000 split in the document. *Id.* at Fact No. 9.
- 3 • M-1 admittedly received the \$1,200,000 from Affliction and actually paid
4 that same money to Fedor, by paying some directly to him and some to a
5 company, consistent with Fedor’s tax concerns. *Id.* at Fact No. 21.
- 6 • No one spoke or wrote about the “consulting agreement” after its execution.
7 *Id.* at Fact No. 10.
- 8 • The fight cards stated Fedor’s purse was \$1,500,000 with no objection from
9 M-1. *Id.* at Fact No. 19.

10 Perhaps most damaging of all are the e-mails by Raimond and Finkelchtein:

- 11 • **5-12-08:** Vadim referencing that they signed Fedor with Affliction (no
12 consulting agreement referenced) and M-1’s investment of the \$500,000
13 they pay, obviously their \$2,000,000 contract obligation minus the
14 \$1,500,000 paid by Affliction. Atencio Decl., ¶ 16 and Ex. A, p. 16.
- 15 • **4-10-09:** Raimond references, relating to the date for the next fight, “Is it
16 still within the contract limitations?” Not contracts. COE, Ex. 19 # 000077.
- 17 • E-mail from Joost on budget (cost) for Barnett v. Fedor fight. He states
18 Purse-Fedor US\$2,000,000 Affliction pays \$1.5 million/ M-1 pays
19 \$500,000. Atencio Decl., Ex. B, pp. 19-22.
- 20 • Raimond e-mail to Binkow at Golden Boy, that M-1 supplements
21 Affliction’s Fedor purse with \$500,000 (again, \$2,000,000 - \$1,500,000 of
22 Affliction). *Id.* at Ex. C, p. 23.
 - 23 ○ Binkow does a budget to Affliction and M-1 on a proposed new
24 deal based on all his conversations, including a fight card with
25 Fedor’s purse as \$1,500,000. Binkow Decl., Ex. A, p. 90.
- 26 • **5-11-09:** Raimond email states, “With respect to Fedor and M-1’s present
27 agreement, how with the “50/50” partnership affect the present agreement?
28 Presumably, the present agreement would no longer require a \$500k +

1 international marketing investment from M-1 AND Fedor's entire \$2
2 million purse is now paid by the joint venture and international revenue is
3 shared. ..." Plaintiff's COE Ex. 88, #000344. [Underlining added.]

4 And most damning of all,

- 5 • **5-18-09:** Raimond states, "Affliction's obligations include \$1.5MM to
6 Fedor in two agreements." Atencio Decl., Ex. D, p. 26 (Second Position).

7 It is no surprise the May 11 and May 18 e-mails are exactly what
8 Finkelchtein testified as what the agreement was. No "consulting" agreement.

9 The only reasonable inference that can be drawn from this uncontroverted
10 evidence is that it was more advantageous for Fedor to receive less in his per-bout
11 purse and the remainder of what Affliction agreed to pay per bout (\$1.5 million)
12 through M-1. The only way to do that, under the pretense of a "valid agreement
13 supported by consideration", was to enter into the sham "consulting agreement"
14 and provide a vehicle through which M-1 would get paid for doing nothing other
15 than what it had the right to do pursuant to the terms of the Fight Agreement.

16 At the very least, a genuine issue of fact exists as to the legitimacy of this
17 "agreement" to deny M-1 partial summary judgment.

18 **3. *M-1's Argument regarding Affliction's Claim of Sham Agreement***
19 ***is Unavailing.***

20 The analysis presented by Plaintiff in its moving papers is misplaced. First,
21 it makes no difference that Fedor was not listed as a party to the agreement. That
22 is the sham! Further, Fedor is also a part owner of M-1. *Id.* at Ex. C (Deposition
23 of Fedor Emelianenko), p. 49, line 17 to p. 50, line 1.

24 Second, a contract can be a sham even if it is not done for the sole purpose
25 of tax evasion. For example, a Korean company (Jinro) entered into a sham
26 agreement with an American company for the purchase of frozen chickens. This
27 sham agreement operated as a front or cover-up of the real intention of the parties,
28 which was for Jinro to participate in a high-risk investment in the United States

1 known as a “roll program”, since Korean law strictly regulates the investment of
2 funds originating in Korea in such a roll program. Jinro advanced \$10 million to
3 the American company, who in turn had \$10 million of Treasury securities
4 assigned to Jinro as collateral for the advance. Disappointed by profits from the
5 roll program, Jinro decided to sue the American company to recover its initial \$10
6 million investment, treating the chicken deal as though it were a legitimate
7 agreement. The defendants argued the chicken deal was designed to cover up a
8 high-risk investment program that circumvented Korea’s currency regulations.
9 *See, Jinro, supra*, at 995-999. Additionally, agreements devised to circumvent
10 state policy, such as agreements seeking to prevent the practice of a business or
11 profession, are also considered sham agreements. *See, Bosley Medical Group v.*
12 *Abramson*, 161 Cal.App.3d 284, 287-88 (1984).

13 Third, even under the law cited by Plaintiff in its moving papers applying to
14 sham agreements for tax purposes, the reasonable inference is that the consulting
15 agreement was a sham. Namely, a transaction is a sham if it has no purpose or
16 economic effect other than the creation of tax deductions. *Bail Bonds by Marvin*
17 *Nelson, Inc. v. Commissioner of the Internal Revenue Service*, 820 F.2d 1543,
18 1548 (1987) (“*Bail Bonds*”). Specifically in *Bail Bonds*, an attorney assisted his
19 clients with tax planning by setting up corporations for his clients (*i.e.*, Bail Bonds
20 by Marvin Nelson) which would enter into agreements with entities created by the
21 attorney (such as Farila and Anglo Dutch). One such agreement was a reinsurance
22 agreement between Bail Bonds and Farila, whereby Farila took to be secondarily
23 liable for Bail Bonds’ losses, but never actually reimbursed Bail Bonds for any
24 forfeitures. In order to make its premium payments to Farila, Bail Bonds was
25 required to obtain two loans from Anglo Dutch. *Id.* at 1545.

26 In essence the proceeds of the loans paid by Bail Bonds to Farila where
27 shortly thereafter transferred to Nelson personally. The tax court characterized the
28 transfer as “part of the pre-arranged transfer of funds designed to produce a

1 corporate level deduction for [Bail Bonds] with the monies transferred ending up
2 in the hands of [Nelson].” *Id.* This ruling was not appealed; whereas, the finding
3 that the nature of the Anglo Dutch loans were a sham was. However, the Court
4 too held the Anglo Dutch loans were shams finding that “both transactions
5 occurred only on paper and operated simply to circulate money among various
6 participants in the [attorney’s] system.” The Court further found that Bail Bonds
7 had not demonstrated that the loans were not shams.

8 In its determination the Court looked to two factors: (1) Had the taxpayer
9 shown that it had a business purpose for engaging in the transaction other than tax
10 avoidance? (2) Had the taxpayer shown that the transaction had economic
11 substance beyond the creation of tax benefits? *Id.* at 1549. “The business purpose
12 factor involves an examination of the subjective factors which motivated a
13 taxpayer to make the transaction at issue. The economic substance factor involves
14 a broader examination of whether the substance of a transaction reflects its form,
15 and whether from an objective standpoint the transaction was likely to produce
16 economic benefits aside from a tax deduction. *Id.*

17 Based upon these factors, in light of the facts presented by Affliction, there
18 can be no question that the consulting agreement is a sham. Given Plaintiff’s own
19 testimony, together with the documents and e-mails presented herewith, there
20 simply is no purpose for the consulting agreement other than to maximize Fedor’s
21 tax obligations (i.e., tax avoidance).

22 As for M-1’s claim that this first draft of the fight agreement, which
23 included \$1.5 million as the purse, when sent contemplated other drafts, it is
24 legally untenable. That theory fails for a number of reasons. First, the e-mail
25 attached to the initial draft does not state that. All it says is, “Here the remarks
26 about Fedors contract”, attaching the draft that contained all necessary
27 components to the agreement. COE, Ex. 130. That is an offer for a contract that
28 can be accepted. Had Affliction accepted the terms of that first draft agreement

1 that would have consummated a contract. Cal. Civ. Code § 1585. Once accepted,
2 M-1 could not have legally come back and said, but wait, we want other terms.
3 Cal. Civ. Code § 1586. Their belief of numerous drafts is irrelevant.

4 Equally lacking is the economic substance of the consulting agreement. As
5 set forth above, there was no consideration provided by M-1 in exchange for the
6 \$1.2 million. Everything that M-1 purports it did under the consulting agreement,
7 as its showing of “economic substance” was a pre-existing duty Fedor and M-1
8 had under the Fight Agreement. There was nothing new required of M-1 by way
9 of the consulting agreement.

10 Even the “step transaction” doctrine cited by M-1 and its three “tests”
11 supports a finding that the consulting agreement was a sham based upon the
12 undisputed evidence presented herein. For example, the undisputed evidence
13 shows that M-1 and Fedor took calculated steps to avoid a direct payment of \$1.5
14 million from Affliction to Fedor (as originally drafted) and instead interjected
15 “economically and legally meaningless transactions” between the start and the end
16 to obtain more favorable tax treatment, thus satisfying the “end result test.” Next,
17 under the end result test, there can be no dispute given the testimony of M-1’s
18 principals that the subjective intent of M-1 was to avoid Fedor getting taxed on
19 \$1.5 million individually in the United States. Instead, M-1 (a foreign entity)
20 accepted the majority of the purse for each bout and immediately thereafter paid
21 that to Fedor and his company. Contrary to M-1’s argument, the Fight Agreement
22 specifically permitted co-promotion between Affliction and Fedor and his
23 designees (*e.g.*, M-1). Plaintiff’s COE Ex. 3, ¶ 6 COE # 000039-40. The type of
24 work allegedly performed by M-1 (promoting and advertising the fights) was
25 further authorized under paragraphs ¶¶ 6, 7, 10 and 11 of the Fight Agreement.
26 Plaintiff’s COE Ex. 3, COE # 000039-42.

27 It does not matter under which of the various tests set forth by M-1 the
28 consulting agreement falls. The evidence presented herein raises more than a

1 reasonable inference that the consulting agreement was a mere sham. Therefore,
2 there is a genuine issue of material fact as to the validity of the consulting
3 agreement and for that reason alone M-1's motion must be denied.

4 C. M-1 Breached the Terms of the Consulting Agreement.

5 Assuming again only for argument's sake the agreement is valid, as set forth
6 in the declarations of Tom Atencio and Todd Beard, a substantial triable issue
7 exists that M-1 did not even do the things that were set forth in the agreement.

8 **V. THE BREACH OF IMPLIED COVENANT CAUSE OF**
9 **ACTION IN RELATION TO THE "CONSULTING AGREEMENT" FAILS**

10 If the consulting agreement, as alleged herein above, is invalid and
11 unenforceable for either lacking consideration or being a sham agreement then
12 there can be no covenant of good faith implied in said non-existent contract.
13 *Pacific States Enterprises, Inc. v. City of Coachella*, 13 Cal.App.4th 1414, 1425
14 (1993). Thus, M-1's fourth cause of action for breach of the implied covenant of
15 good faith and fair dealing must also fail.

16 Notwithstanding, it is well established in California that a breach of the
17 implied covenant of good faith is a breach of the contract. *Schwartz v. State*
18 *Farm Fire and Casualty Co.*, 88 Cal.App.4th 1329 (2001); *Careau & Co. v.*
19 *Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1393 (1990).
20 Furthermore, "only contract remedies are available for breach of the contractual
21 implied covenant [of good faith and fair dealing]." *Copesky v. Sup. Ct.*, 229
22 Cal.App.3d 678, 688 (1991) discussing *Foley v. Interactive Data Corp.*, 47
23 Cal.3d 654 (1988). The only type of business transactions that are amenable to
24 tortious breaches of the implied covenant of good faith and fair dealing are
25 insurance. *Id.* at 689-90.

26 As a result, "where breach of an actual term is alleged, a separate implied
27 covenant claim, based on the same breach, is **superfluous**. On the other hand,
28 where an implied covenant claim alleges a breach of obligations beyond the

1 agreement's actual terms, it is invalid." *Guz v. Bechtel National, Inc.*, 24 Cal.4th
2 317, 327 (2000) (emphasis added). Plaintiff's motion as to this claim must fail.

3 **VI. THE UNDISPUTED EVIDENCE WILL SHOW THAT M-1 FAILED**
4 **TO PERFORM THE LETTER AGREEMENT**

5 The letter agreement was an agreement whereby Affliction would sponsor
6 events around the world known as part of the M-1 Challenge. Pursuant to the
7 agreement, M-1 was to produce a minimum of ten (10) live M-1 Challenge events
8 in 2009. M-1's COE, Ex. 90 COE # 000397.

9 Accordingly, Affliction was to pay a total of \$1 million as sponsorship
10 consideration for the 10 events in exchange for specific benefits. One such benefit
11 was to identify Affliction as the presenting sponsor of every live M-1 Challenge
12 event by, among other things, identifying the title of the M-1 Challenge for all live
13 events as "M-1 Challenge Presented By Affliction" with the Affliction logo to be
14 included in the title; (2) Affliction name and logo to be incorporated into all M-1
15 Global marketing and advertising activities for the M-1 Challenge whether
16 distributed by web, radio, print, television etc. Additionally, Affliction was to
17 receive brand recognition and logo placement at all M-1 Challenge live events,
18 including, but not limited to, red and blue corner posts, logo placement at pre and
19 post-bout events, etc.

20 The payment was to be structured through two payments; one payment of
21 \$500,000 by January 31, 2009, and a second payment of \$500,000 on July 31,
22 2009. Affliction made the first payment, but not the second payment. At that point
23 in time, M-1 could have treated Affliction's failure to pay as a repudiation and
24 stopped any further performance and potentially any right to further payment.
25 Instead, M-1 elected to obligate itself to carry out its full performance under the
26 letter agreement to attempt to collect on the remaining payment.

27 In doing so, M-1 must demonstrate that it undisputedly performed its
28 obligations under the letter agreement. That requires M-1 to show that it provided

1 all of the “benefits” set forth in the letter agreement in exchange for its payment of
2 the second installment of \$500,000. Absent M-1’s performing the terms of the
3 letter agreement that it was obligated to perform, M-1 is in breach and not entitled
4 to recover its damages. Under standard contract law principles and the elements
5 of a breach of contract, a party who has breached a contract (without justification
6 or excuse) may not enforce the contract. *See, Fairchild v. Park* (2001) 90
7 Cal.App.4th 919, 934 (Ortega, J., concurring and dissenting) citing *Otworth v.*
8 *Southern Pac. Transportation Co.*, 166 Cal.App.3d 452, 458 (1985).

9 Here, there is a genuine dispute as to whether M-1 performed its obligations
10 under the letter agreement. Contrary to the purported uncontroverted facts set
11 forth by M-1, Affliction has presented evidence that many of the benefits set forth
12 in the letter agreement were not done and therefore M-1 is in breach of the letter
13 agreement and not entitled to recover the damages it seeks. For instance, the
14 agreement required that the title of the M-1 Challenge live event be a certain way.
15 That did not happen according to the videos submitted by M-1 in support of its
16 motion. Atencio Decl., ¶ 48. Nor did Affliction’s name and logo appear the way
17 it was required to appear, per the terms of the letter agreement, in and around the
18 ring. *Id.* Additionally, most of the contracts that M-1 claims it entered into in
19 relation to the M-1 Challenge events make no mention of Affliction as the
20 sponsor. Plaintiff’s COE, Exs. 98, 100, 101, 103, 105-107, 11, 113, 364, 366-369,
21 371, 372. There can be no doubt that an issue exists as to M-1’s performance
22 under its obligations pursuant to the letter agreement, which not only raises a
23 genuine issue of material fact that must be tried for purposes of this motion, but
24 relinquishes its right to enforce the contract at all.

25 Finally, M-1’s argument that Affliction has waived its right to assert any
26 defense to the quality of M-1’s performance under the letter agreement is
27 misplaced. The question is not the quality of performance; it is the performance
28 itself. M-1 was obligated to perform very specific benefits in exchange for the

1 monetary compensation by Affliction. The question is whether M-1 did perform
2 those items. The evidence unequivocally says it did not. Next, M-1's reliance on
3 *Frank T. Hickey v. Los Angeles Community* for this position is inapposite. That
4 case involved a provision of a contract requiring a written change order and the
5 party performed the work without a written change order. Again, the party in that
6 case was not disputing the work was done; simply that it was done without a
7 change order in writing. Here, the work was not done as M-1 failed to perform
8 many of the specific benefits required in the letter agreement.

9
10 **DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

11 Unlike M-1's motion, Affliction brings its motion for partial summary
12 judgment upon the only valid and enforceable agreement between the parties
13 relating to the fights in which Fedor was to participate, namely, the fight
14 agreement. Plaintiffs claim Affliction breached the fight agreement by "failing to
15 complete the third bout under the Fight Agreement and by failing to pay bout fees
16 and travel and accommodation expenses required under the Fight Agreement."
17 Plaintiff's RFJN, Ex. 2, p. 19, lines 19-21.

18 As set forth herein, together with the undisputed evidence, Affliction is
19 entitled to judgment as a matter of law as to Plaintiffs' first cause of action for
20 breach of the fight agreement.

21 **VII. THE FIGHT AGREEMENT EXPIRED ON MARCH 31, 2009**

22 The interpretation of a contract is a question of law. *Parsons v. Bristol*
23 *Development Co.*, 62 Cal.2d 861, 865 (1965). Contract interpretation "is
24 essentially a judicial function to be exercised according to the generally accepted
25 canons of interpretation so that the purposes of the instrument may be given
26 effect." *Id.* In interpreting a contract, the court considers the language of the
27 contract, the circumstances under which the parties negotiated or entered into the
28

1 contract, the object, nature and subject matter of the contract, and the subsequent
2 conduct of the parties. *Morey v. Vannucci*, 64 Cal.App.4th 904, 912 (1998).

3 Here, the Fight Agreement unambiguously states that the term of the
4 agreement ends the **earlier** of March 31, 2009 or the “conclusion of the **last bout** .
5 . . in **which Fighter [Fedor] is obligated to participate** which is a **minimum of**
6 **three (3) Bouts . . .**” Plaintiff’s COE, Ex. 3 COE # 000039 (emphasis added).

7 It is a general rule of contract law that “when a contract specifies the period
8 of its duration, it **terminates on the expiration of such period**. *Beatty Safway*
9 *Scaffold, Inc. v. B.H. Skrable*, 180 Cal.App.2d 650, 654 (1960) (emphasis added).
10 In other words, the obligations of a contract are discharged by expiration of the
11 term of the agreement. 1 Witkin, Summary of Cal. Law 10th, *Contracts* § 924, p.
12 1021 (2005).

13 It cannot be disputed that a third bout did not happen by March 31, 2009. It
14 is also undisputed that there had been no extensions of the fight agreement prior to
15 March 31, 2009. Bassiri Decl., ¶ 11; Huston Decl., ¶ 6 and Ex. E (Raimond
16 Depo.), p. 73, lines 2-23. Thus, on March 31, 2009 the fight agreement expired on
17 its own terms and all obligations thereunder were discharged.

18 In fact, Plaintiffs acknowledged that the fight agreement had expired when
19 Raimond acknowledged the negotiating window had either expired or was about
20 to expire in requesting an “offer” by Affliction to extend “Fedor beyond the third
21 fight” on June 22, 2009. This request for an offer is in relation to paragraph 18 of
22 the fight agreement, which does not extend any obligation, or even take effect
23 until after the fight agreement **has expired**, by its very terms. Bassiri Decl., Ex.
24 D, p. 42; Plaintiff’s COE, Ex. 3, COE # 000044, ¶18. Plaintiff can have no
25 explanation why such a letter was sent if they did not already know the contract
26 was expired. Steve Bash, M-1’s counsel, sent an e-mail on May 4, 2009
27 referencing the contract expiration of March 31, 2009. Plaintiff’s COE, Ex. 144, #
28 0000782. Finally, Mr. Raimond sends an e-mail on May 18, 2009 stating a deal

1 has to be agreed upon or “we [M-1] do not believe we can do the event.” *Id.* at
2 Ex. 22, COE # 000083. If the fight agreement was extended, as Plaintiffs claim,
3 why would a new deal need to get done before Fedor can do the August 1 event?!
4 Based on M-1’s own admissions, what Affliction has been saying all along is now
5 uncontroverted. The Fight Agreement was not extended and terminated on its
6 own terms on March 31, 2009.

7 **VIII. ANY AGREEMENT FOR A THIRD FIGHT AFTER THE FIGHT**
8 **AGREEMENT EXPIRED CREATED NEW AND DIFFERENT**
9 **OBLIGATIONS**

10 Plaintiffs will undoubtedly argue that Defendant’s conduct subsequent to
11 March 31, 2009 acted as an “extension” of the agreement and/or estoppel to raise
12 the expiration of the contracts as of March 31, 2009. However, this argument fails
13 both legally and factually.

14 Once a contract expires, it cannot be revived. *See, Fanning v. Schammel*,
15 68 Cal.428, 429 (1886). Also, where, after the expiration of a contract fixing the
16 reciprocal rights and obligations of the parties, the parties continue to do business
17 together, the conduct of the parties may at times permit, or even require, a finding
18 that they impliedly agree that their rights and obligations in connection with such
19 business should continue to be measured as provided in the old contract; but even
20 in such case, the reciprocal obligations arise from the new implied contract, and
21 unless an intent to make such a new contract is expressed or may be fairly inferred
22 from the conduct of the parties, the obligations of the parties are not measured by
23 the terms of the expired contract. 17A Am. Jur. 2d *Contracts* § 589 (2010).

24 “Termination” of a contract means “to abrogate so much of it as remains
25 unperformed, thereby doing away with the existing agreement upon the terms and
26 with the consequences agreed upon.” *Grant v. Aerodraulics Co., supra*, at 75.

27 The only evidence Plaintiff claims supports an extension is the language of
28 the May 13, 2009 letter drafted by M-1’s lawyer and executed by Mr. Atencio to

1 obtain a visa for Fedor for the August 1, 2009 event. While the language may
2 state an extension is given, the law does not recognize it as such.

3 Thus, all that happened subsequent to March 31, 2009 is simple. M-1,
4 Fedor and Affliction tried to do a new deal going forward. It could not be done for
5 various reasons that are irrelevant to this issue. They simply agreed to another
6 event, on a given date (Aug. 1, 2009), between Fedor and Josh Barnett and pay
7 Fedor as he had been paid before. Any other conclusion is contrary to the e-mail
8 transmissions and reasonable inferences therefrom and the law.

9 **IX. ALTERNATIVELY, THE CANCELLATION BY AFFLICTION OF**
10 **THE AUGUST 1, 2009 EVENT WAS EXCUSED**

11 California law recognizes a number of defenses to the non-performance of
12 a contract. In other words, there are principles of law that, if met, will excuse a
13 party for breaching a contract. Prevention of performance by a party (Cal. Civ.
14 Code § 1511), impossibility or impracticability (*Christin v. Sup. Ct.*, 9 Cal.2d 526
15 (1937)), frustration of purpose (*Cutter Laboratories, Inc. v. Twining*, 221
16 Cal.App.2d 302 (1963)), and force majeure (*Mathes v. City of Long Beach*, 121
17 Cal.App.2d 473, 477 (1953)), just to name a few.

18 Assuming for argument's sake, that under some theory Affliction had an
19 obligation to provide a third fight, no matter when the date, Affliction's
20 cancellation of the bout scheduled for August 1, 2009, based on the Barnett
21 steroid ban, was excused.

22 **A. Force Majeure**

23 The common law force majeure defense is similar to the defense of
24 impossibility due to an Act of God or an irresistible, superhuman cause that
25 excuses a party's non-performance of obligation. *See* Cal. Civ. Code § 1511. The
26 one distinction is that force majeure does not exclude the idea of human agency.
27 *Mathes v. City of Long Beach*, 121 Cal.App.2d 473, 477 (1953). Thus, "the test
28 for force majeure is whether under the particular circumstances there was such an

1 insuperable interference occurring without the party's intervention as could not
2 have been prevented by the exercise of prudence, diligence and care.' ” *Id.*
3 quoting *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal.2d 228, 238 (1949).

4 By comparison then, the want of performance of a legal duty arising from
5 tort or contract, in whole or in part, or any delay therein, is excused when it is
6 prevented or delayed by an irresistible, superhuman cause, and/or force majeure,
7 unless the parties have expressly agreed to the contrary. *See* Cal. Civ. Code §
8 1511; *see also* Cal. Com. Code § 2613.

9 Under California law it must be demonstrated that the excusing event was
10 **beyond the reasonable control** of either party. *See Oosten v. Hay Haulers Dairy*
11 *Employees & Helpers Union*, 45 Cal.2d 784, 789-790 (1955). The term
12 “reasonable control” encompasses two factors. First, a party may not
13 affirmatively cause the event that prevents his performance and second a party
14 may not rely on an excusing event if the party could have taken reasonable steps to
15 prevent it. *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530,
16 1540 (5th Cir. 1984) [applying California law].

17 Here, there is no question both facts are present. It is undisputed that Josh
18 Barnett tested positive for steroid use and as a result he was denied a license by
19 the California Athletic Commission to participate in the August 1, 2009 fight with
20 Fedor. Notice of such was received by Affliction on July 21, 2009. Atencio
21 Decl., ¶ 36.

22 It is also undisputed that Josh Barnett testing positive for steroid use and, as
23 a result, being disqualified by the California Athletic Commission from
24 participating in the August 1, 2010 bout was something that was beyond the
25 reasonable control of Affliction or Plaintiffs. Affliction did not cause Josh
26 Barnett to test positive for steroid use nor could it have done anything to prevent
27 it from happening. *Id.* Plaintiffs admittedly have no knowledge that Affliction
28 caused Josh Barnett to test positive for steroids and his subsequent

1 disqualification. Huston Decl., Ex. C (Fedor Depo.), p. 51, line 23 to p. 52, line
2 9; Ex. E (Joost Raimond Depo.) p. 79, lines 10-25. Nor will Plaintiffs be able to
3 present any evidence of such in opposition. Such a claim would be absurd.

4 Furthermore, this was not an instance where the excusing event could have
5 been prevented by the payment of money or some other action by the breaching
6 party. *See e.g., Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc., supra*, at
7 1543. Affliction could have done nothing to prevent Josh Barnett from ingesting
8 or injecting steroids, short of hiring a person to be with him 24 hours a day, 7
9 days a week, obviously not a legal nor reasonable obligation.

10 Plaintiffs can also not escape these facts by saying Mr. Atencio knew of
11 Barnett's prior steroid use. They agreed to Barnett and his prior one-time steroid
12 issue was public knowledge. He fought subsequent to that occurrence.

13 Accordingly, Affliction's decision to cancel the August 1, 2009 was wholly
14 justified under the doctrine of force majeure. Affliction is therefore entitled to
15 judgment as a matter of law as it has a complete defense to Plaintiffs' breach of
16 contract cause of action as to the fight agreement.

17 **B. Impossibility/Impracticability Defense**

18 The facts and circumstances that transpired as a result of Josh Barnett
19 testing positive for steroid use and him being denied a license to participate in the
20 August 1 bout with Fedor resemble a textbook case study of the
21 impossibility/impracticability defense.

22 At common law, the determination that a contract was impossible to
23 perform was limited to literal or physical impossibility. *Kennedy v. Reece*, 225
24 Cal.App.2d 717, 724 (1964). However, modern cases recognize something as
25 legally impossible when it is impracticable, that is, when it can be done only at an
26 excessive and unreasonable cost. *People v. Meyers*, 215 Cal. 115, 119 (1932);
27 *Christin v. Sup. Ct.*, 9 Cal.2d 526, 533 (1937). The defense of impracticability is
28

1 based upon facts that make performance more difficult or expensive than the
2 parties anticipated. *Kennedy v. Reece, supra*, at 725.

3 The effect of the impracticability doctrine is to relieve the obligor of his or
4 her duty because the contract, having been made on a different “basic
5 assumption,” is regarded as not covering the case. Rest. 2d, Contracts, Vol. 2,
6 Chap. 11, p. 311 (Introductory Note).

7 Even where the obligor has not limited his obligation by agreement, the
8 court may grant relief because “an extraordinary circumstance may make
9 performance so vitally different from what was reasonably to be expected as to
10 alter the essential nature of that performance.” *Id.* at p. 309.

11 There are three distinct grounds for discharging the obligor’s duty. First,
12 the obligor may claim that some circumstance has made his own performance
13 impracticable. *Id.* at p. 309. Second, the obligor may claim that some
14 circumstance has so destroyed the value to him of the other party’s performance as
15 to frustrate his own purpose in making the contract. Rest. 2d, Contracts § 265.
16 Third, the obligor may claim that he will not receive the agreed exchange for his
17 own performance because some circumstance has discharged the obligee’s duty on
18 the ground of either impracticability or frustration. *Id.* at §§ 237, 267.

19 A party invoking impossibility/impracticability must show that reasonable
20 efforts were used to surmount the obstacles that prevented performance.
21 *McCalden v. California Library Assn.*, 955 F.2d 1214, 1219 (9th Cir. 1990).

22 Initially, there is and was nothing that could be done to allow Barnett to
23 fight on August 1, 2009. He was the agreed-upon fighter and he could not fight.
24 Further, no one could know when or if he would ever be reinstated. In fact, it is
25 almost two years after the disqualification and he still cannot fight in California.
26 At that moment, it was impossible to have the fight that was agreed upon to go
27 forward on August 1, 2009. Affliction undisputedly was excused from any
28 obligation to Plaintiffs in relation to that very specific fight.

1 Much has been made about canceling versus postponing the fight.
2 Defendant submits that issue is irrelevant for two reasons.

3 First, the agreement was not to simply have another fight, it was to have this
4 particular fight (Fedor v. Barnett) and this very particular fight could not happen.

5 Second, Defendant was undisputedly getting out of the fight promotion
6 business after August 1, 2009. Ignoring the fact the Fight Agreement had expired,
7 in the light most favorable for M-1, there was somehow an extension of the fight
8 agreement until August 1, 2009. When a fight could not happen by that date, the
9 contract, even under Plaintiffs' interpretation, expired by its own terms. Can they
10 reasonably argue there had to be an indefinite postponement? Of course not.

11 Likewise, without even any discussion of any agreement for a replacement
12 fighter, M-1 cannot place upon Affliction an obligation to accept someone else no
13 matter the cost, the fighter's condition, or the timing of the replacement. That is
14 the purpose behind the impracticability defense, not to force such a circumstance.

15 It is undisputed, Golden Boy opined the fight should not proceed on August
16 1, 2009 and that the only possible opponent, Brett Rogers, was not a viable
17 substitute. Showtime, the Pay-Per-View provider, strongly suggested the fight not
18 happen on August 1, 2009. The hurdle of advertising is also undisputed. The drop
19 in revenue for a replacement at this late date, as well as additional costs, is not
20 disputed. Whether that cost was \$800,000 or some other figure is irrelevant. It is
21 present. There is no requirement under the law that would force such an
22 obligation to replace the fighter at whatever costs upon a contracting party.

23 **X. ISSUES OF REPLACEMENT FIGHTERS, POSTPONING THE**
24 **AUGUST 1ST FIGHT AND THE UFC ARE RED HERRINGS**

25 It is anticipated, by way of Plaintiff's motion, that Plaintiffs will raise one or
26 more of the following issues in hopes of creating a triable issue. However, these
27 "alleged" issues are not material in any way and only referenced to draw the
28 Court's attention to very clear facts the contract was expired.

1 First, upon the expiration of the fight agreement on March 31, 2009,
2 Affliction's obligations to perform any act pursuant to that agreement were
3 extinguished with the exception of paragraph 18, as were those of Plaintiffs (M-1
4 and Fedor). However, this paragraph simply allowed Affliction to attempt to keep
5 Fedor under the Exclusivity rights of paragraph 7. The remedy if no new
6 agreement is reached is simply that Fedor can enter into a new contract with third
7 parties. Pursuant to the post-March 31, 2009 agreement of a fight on August 1,
8 2009 between Fedor and Barnett, there was no provision or even discussions that
9 if the agreed to and contemplated fighters could not participate that either party
10 was obligated to provide a replacement fighter. Whether such a term was included
11 in a prior agreement is of no moment, as that agreement is no longer in effect.

12 Second, as with the replacement fighter issue, there was further no
13 requirement nor even discussion to extend past August 1, 2009 to stage this fight if
14 something unexpected occurred. In other words, there was nothing mandating a
15 postponement of the fight set for August 1, 2009. M-1's claim that during
16 negotiations with UFC in early July, 2009, before Barnett's disqualification
17 occurred, Affliction discussed postponing the August 1, 2009 is misconstrued.
18 Affliction proposed that the **UFC take over** the Trilogy event scheduled for
19 August 1, 2009 and postpone it to September 19, 2009; not that Affliction was
20 agreeing with Fedor or M-1 to continue staging the fight and postponing it to
21 September. Fedor was not a party to this offer, which was rejected immediately
22 by the UFC. Thus, Plaintiffs misinterpret their own evidence. Furthermore,
23 Affliction had made a business decision that it was exiting the MMA event
24 promotion business after the August 1, 2009 fight between Fedor and Barnett. M-
25 1's e-mail of July 14, 2009 even confirms M-1 was informed of this. Plaintiff's
26 COE, Ex. 67. Affliction simply had no obligation to postpone the event. Why
27 then did they attempt to find a replacement fighter? That too is obvious.
28 Affliction had expended a great amount of money into this event. From a business

1 standpoint they needed to explore the possibility, if it existed, of how to lose the
2 least amount of money. A loss was already assured. The option with the least loss
3 was cancellation. Since there was no contract that prevented this decision, it was
4 the only intelligent business decision.

5 Plaintiffs make a monumental issue out of Affliction's business decision to
6 cancel as relating to some conspiracy with the UFC that arose after the steroid
7 issue arose. That theory has simply not produced any factual support because it
8 did not happen. Affliction began negotiations with the UFC about entering into a
9 clothing sponsorship deal with UFC – the main promoter of MMA events. Aside
10 from the irrelevance any agreement Affliction entered into with the UFC has as to
11 the validity and/or enforcement of the sham consulting agreement and/or the fight
12 agreement, Affliction began these negotiations and decided to enter into this
13 agreement with the UFC **weeks before** the news of Barnett testing positive for
14 steroids arose. Bassiri Decl., ¶¶ 15-16 and Ex. E, p. 43.

15 Furthermore, Plaintiffs claim of "hurrying" up with the UFC so that the deal
16 could be struck before Fedor landed in the U.S. so that the obligation to pay
17 pursuant to the sham consulting agreement is simply absurd. Unfortunately, that is
18 all Plaintiffs have as there is no legal or factual basis for their claims.

19 Plaintiffs took the deposition of the UFC representatives and that did not
20 produce any evidence to this theory. The evidence, pre-steroid notification, is that
21 Affliction would only exit the business after the August 1, 2009 event. As the
22 evidence submitted by both sides clearly proves the proximity of the transaction
23 relates only to the fact the negotiations admittedly started within 2 weeks of the
24 August 1, 2009 event. That does not create the unreasonable inference that UFC
25 and Affliction knew Barnett would test positive for steroids in early July and thus
26 concocted a scenario to cancel an event that had already cost Affliction substantial
27 money, just to get out of an event they promoted. It does not make sense because
28 it is not true.

1 Dated: March 28, 2011

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2
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8 Inc. dba Affliction Clothing and
9 Defendant, Affliction Entertainment
10 Group, LLC, erroneously sued herein
11 as Affliction Entertainment, LLC
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